

II. PRELIMINARY PROCEEDINGS	TITLE II. PRELIMINARY PROCEEDINGS
Rule 3. The Complaint	Rule 3. The Complaint
The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a magistrate judge.	The complaint is a written statement of the essential facts constituting the offense charged. It must be made under oath before a magistrate judge, or, if none is reasonably available, before a state or local judicial officer.

COMMITTEE NOTE

The language of Rule 3 is amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended, except as described below.

The amendment makes one change in practice. Currently, Rule 3 requires the complaint to be sworn before a "magistrate judge," which under current Rule 54 could include a state or local judicial officer. Revised Rule 1 no longer includes state and local officers in the definition of magistrate judges for the purposes of these rules. Instead, the definition includes only United States magistrate judges. Rule 3 requires that the complaint be made before a United States magistrate judge or before a state or local officer. The revised rule does, however, make a change to reflect prevailing practice and the outcome desired by the Committee — that the procedure take place before a *federal* judicial officer if one is reasonably available. As noted in Rule 1(c), where the rules, such as Rule 3, authorize a magistrate judge to act, any other federal judge may act.

Rule 4. Arrest Warrant or Summons Upon Complaint	Rule 4. Arrest Warrant or Summons on a Complaint
<p>(a) Issuance. If it appears from the complaint, or from an affidavit or affidavits filed with the complaint, that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. Upon the request of the attorney for the government a summons instead of a warrant shall issue. More than one warrant or summons may issue on the same complaint. If a defendant fails to appear in response to the summons, a warrant shall issue.</p>	<p>(a) Issuance. If the complaint or one or more affidavits filed with the complaint establish probable cause to believe that an offense has been committed and that the defendant committed it, the judge must issue an arrest warrant to an officer authorized to execute it. At the request of the attorney for the government, the judge must issue a summons, instead of a warrant, to a person authorized to serve it. A judge may issue more than one warrant or summons on the same complaint. If a defendant fails to appear in response to a summons, a judge may, and upon request of the attorney for the government must, issue a warrant.</p>
<p>(b) Probable Cause. The finding of probable cause may be based upon hearsay evidence in whole or in part.</p>	
<p>(c) Form.</p> <p>(1) Warrant. The warrant shall be signed by the magistrate judge and shall contain the name of the defendant or, if the defendant's name is unknown, any name or description by which the defendant can be identified with reasonable certainty. It shall describe the offense charged in the complaint. It shall command that the defendant be arrested and brought before the nearest available magistrate judge.</p> <p>(2) Summons. The summons shall be in the same form as the warrant except that it shall summon the defendant to appear before a magistrate at a stated time and place.</p>	<p>(b) Form.</p> <p>(1) Warrant. A warrant must:</p> <ul style="list-style-type: none"> (A) contain the defendant's name or, if it is unknown, a name or description by which the defendant can be identified with reasonable certainty; (B) describe the offense charged in the complaint; (C) command that the defendant be arrested and brought before a magistrate judge without unnecessary delay or, if none is reasonably available, before a state or local judicial officer; and (D) be signed by a judge. <p>(2) Summons. A summons is to be in the same form as a warrant except that it must require the defendant to appear before a magistrate judge at a stated time and place.</p>

<p>(d) Execution or Service; and Return.</p> <p>(1) By Whom. The warrant shall be executed by a marshal or by some other officer authorized by law. The summons may be served by any person authorized to serve a summons in a civil action.</p> <p>(2) Territorial Limits. The warrant may be executed or the summons may be served at any place within the jurisdiction of the United States.</p>	<p>(c) Execution or Service, and Return.</p> <p>(1) <i>By Whom.</i> Only a marshal or other authorized officer may execute a warrant. Any person authorized to serve a summons in a federal civil action may serve a summons.</p> <p>(2) <i>Territorial Limits.</i> A warrant may be executed, or a summons served, only within the jurisdiction of the United States.</p>
<p>(3) Manner. The warrant shall be executed by the arrest of the defendant. The officer need not have the warrant at the time of the arrest but upon request shall show the warrant to the defendant as soon as possible. If the officer does not have the warrant at the time of the arrest, the officer shall then inform the defendant of the offense charged and of the fact that a warrant has been issued. The summons shall be served upon a defendant by delivering a copy to the defendant personally, or by leaving it at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein and by mailing a copy of the summons to the defendant's last known address.</p>	<p>(3) <i>Manner.</i></p> <p>(A) A warrant is executed by arresting the defendant. Upon arrest, an officer possessing the warrant must show it to the defendant. If the officer does not possess the warrant, the officer must inform the defendant of the warrant's existence and of the offense charged and, at the defendant's request, must show the warrant to the defendant as soon as possible.</p> <p>(B) A summons is served on a defendant:</p> <p style="padding-left: 40px;">(i) by personal delivery; or</p> <p style="padding-left: 40px;">(ii) by leaving it at the defendant's residence or usual place of abode with a person of suitable age and discretion residing at that location and by mailing a copy to the defendant's last known address.</p> <p>(C) A summons to an organization is served by delivering a copy to an officer or to a managing or general agent or to another agent appointed or legally authorized to receive service of process. A copy must also be mailed to the organization's last known address within the district or to its principal place of business elsewhere in the United States.</p>

(4) Return. The officer executing a warrant shall make return thereof to the magistrate judge or other officer before whom the defendant is brought pursuant to Rule 5. At the request of the attorney for the government any unexecuted warrant shall be returned to and canceled by the magistrate judge by whom it was issued. On or before the return day the person to whom a summons was delivered for service shall make return thereof to the magistrate judge before whom the summons is returnable. At the request of the attorney for the government made at any time while the complaint is pending, a warrant returned unexecuted and not canceled or summons returned unserved or a duplicate thereof may be delivered by the magistrate judge to the marshal or other authorized person for execution or service.

(4) Return.

- (A) After executing a warrant, the officer must return it to the judge before whom the defendant is brought in accordance with Rule 5. At the request of the attorney for the government, an unexecuted warrant must be brought back to and canceled by a magistrate judge or, if none is reasonably available, by a state or local officer.
- (B) The person to whom a summons was delivered for service must return it on or before the return day.
- (C) At the request of the attorney for the government, a judge may deliver an unexecuted warrant or an unserved summons or a copy of the warrant or summons to the marshal or other authorized person for execution or service.

COMMITTEE NOTE

The language of Rule 4 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic, except as noted below.

The first non-stylistic change is in Rule 4(a), which has been amended to provide an element of discretion in those situations when the defendant fails to respond to a summons. Under the current rule, the judge must in all cases issue an arrest warrant. The revised rule provides discretion to the judge to issue an arrest warrant if the attorney for the government does not request that an arrest warrant be issued for a failure to appear.

Current Rule 4(b), which refers to the fact that hearsay evidence may be used to support probable cause, has been deleted. That language was added to the rule in 1974, apparently to reflect emerging federal case law. See Advisory Committee Note to 1974 Amendments to Rule 4 (citing cases). A similar amendment was made to Rule 41 in 1972. In the intervening years, however, the case law has become perfectly clear on that proposition. Thus, the Committee believed that the reference to hearsay was no longer necessary. Furthermore, the limited reference to hearsay evidence was misleading to the extent that it might have suggested that other forms of inadmissible evidence could not be considered. For example, the rule made no reference to considering a defendant's prior criminal record, which clearly may be considered in deciding whether probable cause exists. See, e.g., *Brinegar v. United States*, 338 U.S. 160 (1949) (officer's knowledge of defendant's prior criminal activity). Rather than address that issue, or any other similar issues, the Committee believed that the matter was best addressed in Rule 1101(d)(3), Federal Rules of Evidence. That rule explicitly provides that the Federal Rules of Evidence do not apply to "preliminary examinations in criminal cases, . . . issuance of warrants for arrest, criminal summonses, and search warrants." The Advisory Committee Note accompanying that rule recognizes that: "The nature of the proceedings makes application of the formal rules of evidence inappropriate and impracticable." The Committee did not intend to make any substantive changes in practice by deleting

the reference to hearsay evidence.

New Rule 4(b), which is currently Rule 4(c), addresses the form of an arrest warrant and a summons and includes two non-stylistic changes. First, Rule 4(b)(1)(C) requires that the warrant require that the defendant be brought "without unnecessary delay" before a judge. The Committee believed that this was a more appropriate standard than the current requirement that the defendant be brought before the "nearest available" magistrate judge. This new language accurately reflects the thrust of the original rule, that time is of the essence and that the defendant should be brought with dispatch before a judicial officer in the district. Second, the revised rule states a preference that the defendant be brought before a federal judicial officer.

Rule 4(b)(2) has been amended to require that if a summons is issued, the defendant must appear before a magistrate judge. The current rule requires the appearance before a "magistrate," which could include a state or local judicial officer. This change is consistent with the preference for requiring defendants to appear before federal judicial officers stated in revised Rule 4(b)(1).

Rule 4(c) (currently Rule 4(d)) includes three changes. First, current Rule 4(d)(3) provides that the arresting officer is only required to inform the defendant of the offense charged and that a warrant exists if the officer does not have a copy of the warrant. As revised, Rule 4(c)(3)(A) explicitly requires the arresting officer in all instances to inform the defendant of the offense charged and of the fact that an arrest warrant exists. The new rule continues the current provision that the arresting officer need not have a copy of the warrant but if the defendant requests to see it, the officer must show the warrant to the defendant as soon as possible. The rule does not attempt to define any particular time limits for showing the warrant to the defendant.

Second, Rule 4(c)(3)(C) is taken from former Rule 9(c)(1). That provision specifies the manner of serving a summons on an organization. The Committee believed that Rule 4 was the more appropriate location for general provisions addressing the mechanics of arrest warrants and summonses. Revised Rule 9 liberally cross-references the basic provisions appearing in Rule 4. Under the amended rule, in all cases in which a summons is being served on an organization, a copy of the summons must be mailed to the organization.

Third, a change is made in Rule 4(c)(4). Currently, Rule 4(d)(4) requires that an unexecuted warrant must be returned to the judicial officer or judge who issued it. As amended, Rule 4(c)(4)(A) provides that after a warrant is executed, the officer must return it to the judge before whom the defendant will appear under Rule 5. At the government's request, however, an unexecuted warrant may be returned and canceled by any magistrate judge. The change recognizes the possibility that at the time the warrant is returned, the issuing judicial officer may not be available.

Rule 5. Initial Appearance Before the Magistrate Judge	Rule 5. Initial Appearance
<p>(a) In General. Except as otherwise provided in this rule, an officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available federal magistrate judge or, if a federal magistrate judge is not reasonably available, before a state or local judicial officer authorized by 18 U.S.C. § 3041. If a person arrested without a warrant is brought before a magistrate judge, a complaint, satisfying the probable cause requirements of Rule 4(a), shall be promptly filed. When a person, arrested with or without a warrant or given a summons, appears initially before the magistrate judge, the magistrate judge shall proceed in accordance with the applicable subdivisions of this rule.</p>	<p>(a) In General.</p> <p>(1) <i>Appearance Upon Arrest.</i></p> <p>(A) A person making an arrest within the United States must take the defendant without unnecessary delay before a magistrate judge, or before a state or local judicial officer as Rule 5(c) provides.</p> <p>(B) A person making an arrest outside the United States must take the defendant without unnecessary delay before a magistrate judge.</p>

<p>An officer making an arrest under a warrant issued upon a complaint charging solely a violation of 18 U.S.C. § 1073 need not comply with this rule if the person arrested is transferred without unnecessary delay to the custody of appropriate state or local authorities in the district of arrest and an attorney for the government moves promptly, in the district in which the warrant was issued, to dismiss the complaint.</p>	<p>(2) <i>Exceptions.</i></p> <p>(A) An officer making an arrest under a warrant issued upon a complaint charging solely a violation of 18 U.S.C. § 1073 need not comply with this rule if:</p> <ul style="list-style-type: none"> (i) the person arrested is transferred without unnecessary delay to the custody of appropriate state or local authorities in the district of arrest; and (ii) an attorney for the government moves promptly, in the district where the warrant was issued, to dismiss the complaint. <p>(B) If a defendant is arrested for a violation of probation or supervised release, Rule 32.1 applies.</p> <p>(C) If a defendant is arrested for failing to appear in another district, Rule 40 applies.</p> <p>(3) <i>Appearance Upon a Summons.</i> When a defendant appears in response to a summons under Rule 4, a magistrate judge must proceed under Rule 5(d) or (e), as applicable.</p>
	<p>(b) <i>Complaint Required.</i> If a defendant is arrested without a warrant, a complaint meeting Rule 4(a)'s requirement of probable cause must be promptly filed in the district where the offense was allegedly committed.</p>

	<p>(c) Initial Appearance; Transfer to Another District.</p> <p>(1) <i>Arrest in the District Where the Offense Was Allegedly Committed.</i> If the defendant is arrested in the district where the offense was allegedly committed:</p> <p>(A) the initial appearance must be in that district; and</p> <p>(B) if a magistrate judge is not reasonably available, the initial appearance may be before a state or local judicial officer.</p>
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- (2) ***Arrest in District Other Than the District Where the Offense Was Allegedly Committed.*** If the defendant is arrested in a district other than where the offense was allegedly committed, the following procedures apply:
- (A) the initial appearance must be in that district, or in an adjacent district if the appearance can occur more promptly there;
 - (B) the judge must inform the defendant of the provisions of Rule 20;
 - (C) if the defendant was arrested without a warrant, the district court where the prosecution is pending must first issue a warrant before the magistrate judge transfers the defendant to that district;
 - (D) the judge must conduct a preliminary hearing as required under Rule 5.1 or Rule 58(b)(2)(G);
 - (E) the judge must transfer the defendant to the district where the prosecution is pending if:
 - (i) the government produces the warrant, a certified copy of the warrant, a facsimile of either, or other appropriate form of either; and
 - (ii) the judge finds that the defendant is the same person named in the indictment, information, or warrant; and
 - (F) when a defendant is transferred or discharged, the court must promptly transmit the papers and any bail to the clerk in the district where the prosecution is pending.

<p>(c) Offenses Not Triable by the United States Magistrate Judge. If the charge against the defendant is not triable by the United States magistrate judge, the defendant shall not be called upon to plead. The magistrate judge shall inform the defendant of the complaint against the defendant and of any affidavit filed therewith, of the defendant's right to retain counsel or to request the assignment of counsel if the defendant is unable to obtain counsel, and of the general circumstances under which the defendant may secure pretrial release. The magistrate judge shall inform the defendant that the defendant is not required to make a statement and that any statement made by the defendant may be used against the defendant. The magistrate judge shall also inform the defendant of the right to a preliminary examination. The magistrate judge shall allow the defendant reasonable time and opportunity to consult counsel and shall detain or conditionally release the defendant as provided by statute or in these rules.</p> <p style="text-align: center;">* * * * *</p>	<p>(d) Procedure in a Felony Case.</p> <p>(1) <i>Advice.</i> If the offense charged is a felony, the judge must inform the defendant of the following:</p> <ul style="list-style-type: none"> (A) the complaint against the defendant, and any affidavit filed with it; (B) the defendant's right to retain counsel or to request that counsel be appointed if the defendant cannot obtain counsel; (C) the circumstances, if any, under which the defendant may secure pretrial release; (D) any right to a preliminary hearing; and (E) the defendant's right not to make a statement, and that any statement made may be used against the defendant. <p>(2) <i>Consultation with Counsel.</i> The judge must allow the defendant reasonable opportunity to consult with counsel.</p> <p>(3) <i>Detention or Release.</i> The judge must detain or release the defendant as provided by statute or these rules.</p> <p>(4) <i>Plea.</i> A defendant may be asked to plead only under Rule 10.</p>
<p>(b) Misdemeanors and Other Petty Offenses. If the charge against the defendant is a misdemeanor or other petty offense triable by a United States magistrate judge under 18 U.S.C. § 3401, the magistrate judge shall proceed in accordance with Rule 58.</p>	<p>(e) Procedure in a Misdemeanor Case. If the defendant is charged with a misdemeanor only, the judge must inform the defendant in accordance with Rule 58(b)(2).</p>

COMMITTEE NOTE

The language of Rule 5 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic, except as noted below.

Rule 5 has been completely revised to more clearly set out the procedures for initial appearances and to recognize that such appearances may be required at various stages of a criminal proceeding, for example, where a defendant has been arrested for violating the terms of probation.

Rule 5(a), which governs initial appearances by an arrested defendant before a magistrate judge, includes several changes. The first is a clarifying change; revised Rule 5(a)(1) provides that a person making the arrest must bring the defendant "without unnecessary delay" before a magistrate judge, instead of the current reference to "nearest available" magistrate. This language parallels changes in Rule 4 and reflects the view that time is of the essence. The Committee intends no change in practice. In using the term, the Committee recognizes that on occasion there may be necessary delay in presenting the defendant, for example, due to weather conditions or other natural causes. A second change is non-stylistic, and reflects the stated preference (as in other provisions throughout the rules) that the defendant be brought before a federal judicial officer. Only if a magistrate judge is not available should the defendant be taken before a state or local officer.

The third sentence in current Rule 5(a), which states that a magistrate judge must proceed in accordance with the rule when a defendant is arrested without a warrant or given a summons, has been deleted because it is unnecessary.

Rule 5(a)(1)(B) codifies the case law reflecting that the right to an initial appearance applies not only when a person is arrested within the United States but also when an arrest occurs outside the United States. *See, e.g., United States v. Purvis*, 768 F.2d 1237 (11th Cir. 1985); *United States v. Yunis*, 859 F.2d 953 (D.C. Cir. 1988). In these circumstances, the Committee believes — and the rule so provides — that the initial appearance should be before a federal magistrate judge rather than a state or local judicial officer.

Rule 5(a)(2)(A) consists of language currently located in Rule 5, that addresses the procedure to be followed when a defendant has been arrested under a warrant issued on a complaint charging solely a violation of 18 U.S.C. § 1073 (unlawful flight to avoid prosecution). Rule 5(a)(2)(B) and 5(a)(2)(C) are new provisions. They are intended to make it clear that when a defendant is arrested for violating probation or supervised release or for failing to appear in another district, Rules 32.1 and 40 apply. No change in practice is intended.

Rule 5(a)(3) is new and fills a perceived gap in the rules. It recognizes that a defendant may be subjected to an initial appearance under this rule if a summons was issued under Rule 4, instead of an arrest warrant. If the defendant is appearing pursuant to a summons in a felony case, Rule 5(d) applies and if the defendant is appearing in a misdemeanor case, Rule 5(e) applies.

Rule 5(b) carries forward the requirement in former Rule 5(a) that if the defendant is arrested without a warrant, a complaint must be promptly filed.

Rule 5(c) is a new provision setting out where an initial appearance is to take place. If the defendant is arrested in the district where the offense was allegedly committed, under Rule 5(c)(1), the defendant must be taken to a magistrate judge in that district. If no magistrate judge is reasonably available, a state or local judicial officer may conduct the initial appearance. On the other hand, if the defendant is arrested in a district other than the district where the offense was allegedly committed, Rule 5(c)(2) governs. In those instances, the defendant must be taken to a magistrate judge within the district of arrest, unless the appearance can take place more promptly in an adjacent district. The Committee recognized that in some cases, the nearest magistrate judge may actually be across a district's lines. The remainder of Rule 5(c)(2) includes material formerly located in Rule 40.

Rule 5(d) is derived from current Rule 5(c) and has been retitled to more clearly reflect the subject of that subdivision — the procedure to be used if the defendant is charged with a felony. Rule 5(d)(4) has been added to make clear that a defendant may only be called upon to enter a plea under the provisions of Rule 10. That language is intended to reflect and reaffirm current practice.

The remaining portions of current Rule 5(c) have been moved to Rule 5.1, which deals with preliminary hearings in felony cases.

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 5 is one of those rules. In restyling and reformatting Rule 5, the Committee decided to also propose a substantive change that would permit video teleconferencing of initial appearances. Another version of Rule 5, which includes a new subdivision (f) governing such procedures, is being published simultaneously in a separate pamphlet.

	Rule 5.1. Preliminary Hearing in a Felony Case
<p>Rule 5(c). Offenses Not Triable by the United States Magistrate Judge.</p> <p style="text-align: center;">* * * * *</p> <p>A defendant is entitled to a preliminary examination, unless waived, when charged with any offense, other than a petty offense, which is to be tried by a judge of the district court. If the defendant waives preliminary examination, the magistrate judge shall forthwith hold the defendant to answer in the district court. If the defendant does not waive the preliminary examination, the magistrate judge shall schedule a preliminary examination.</p>	<p>(a) In General. If a defendant is charged with a felony, a magistrate judge must conduct a preliminary hearing unless:</p> <ol style="list-style-type: none"> (1) the defendant waives the hearing; (2) the defendant is indicted; or (3) the government files an information under Rule 7(b).
	<p>(b) Election of District. A defendant arrested in a district other than where the offense was allegedly committed may elect to have the preliminary hearing conducted in the district where the prosecution is pending.</p>
<p>Such examination shall be held within a reasonable time but in any event not later than 10 days following the initial appearance if the defendant is in custody and no later than 20 days if the defendant is not in custody, provided, however, that the preliminary examination shall not be held if the defendant is indicted or if an information against the defendant is filed in district court before the date set for the preliminary examination.</p>	<p>(c) Scheduling. The magistrate judge must hold the preliminary hearing within a reasonable time, but no later than 10 days after the initial appearance if the defendant is in custody and no later than 20 days if not in custody.</p>
<p>With the consent of the defendant and upon a showing of good cause, taking into account the public interest in the prompt disposition of criminal cases, time limits specified in this subdivision may be extended one or more times by a federal magistrate judge. In the absence of such consent by the defendant, time limits may be extended by a judge of the United States only upon a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice.</p>	<p>(d) Extending the Time. With the defendant's consent and upon a showing of good cause — taking into account the public interest in the prompt disposition of criminal cases — a magistrate judge may extend the time limits in Rule 5.1(c) one or more times. If the defendant does not consent, a justice or judge of the United States as these terms are defined in 28 U.S.C. § 451 may extend the time limits only on a showing that extraordinary circumstances exist and justice requires the delay.</p>

<p>Rule 5.1. Preliminary Examination</p> <p>(a) Probable Cause Finding. If from the evidence it appears that there is probable cause to believe that an offense has been committed and that the defendant committed it, the federal magistrate judge shall forthwith hold the defendant to answer in district court. The finding of probable cause may be based upon hearsay evidence in whole or in part. The defendant may cross-examine adverse witnesses and may introduce evidence. Objections to evidence on the ground that it was acquired by unlawful means are not properly made at the preliminary examination. Motions to suppress must be made to the trial court as provided in Rule 12.</p>	<p>(e) Hearing and Finding. At the preliminary hearing, the defendant may cross-examine adverse witnesses and may introduce evidence but cannot object to evidence on the ground that it was unlawfully acquired. If the magistrate judge finds probable cause to believe an offense has been committed and the defendant committed it, the magistrate judge must promptly require the defendant to appear for further proceedings.</p>
<p>(b) Discharge of Defendant. If from the evidence it appears that there is no probable cause to believe that an offense has been committed or that the defendant committed it, the federal magistrate judge shall dismiss the complaint and discharge the defendant. The discharge of the defendant shall not preclude the government from instituting a subsequent prosecution for the same offense.</p>	<p>(f) Discharging the Defendant. If the magistrate judge finds no probable cause to believe an offense has been committed or the defendant committed it, the magistrate judge must dismiss the complaint and discharge the defendant. A discharge does not preclude the government from later prosecuting the defendant for the same offense.</p>
<p>(c) Records. After concluding the proceeding the federal magistrate judge shall transmit forthwith to the clerk of the district court all papers in the proceeding. The magistrate judge shall promptly make or cause to be made a record or summary of such proceeding.</p> <p>(1) On timely application to a federal magistrate judge, the attorney for a defendant in a criminal case may be given the opportunity to have the recording of the hearing on preliminary examination made available to that attorney in connection with any further hearing or preparation for trial. The court may, by local rule, appoint the place for and define the conditions under which such opportunity may be afforded counsel.</p>	<p>(g) Records. The preliminary hearing must be recorded by a court reporter or by a suitable recording device. A recording of the proceeding may be made available to any party upon request. A copy of the recording and a transcript may be provided to any party upon request and upon payment as required by applicable Judicial Conference regulations.</p>

<p>(2) On application of a defendant addressed to the court or any judge thereof, an order may issue that the federal magistrate judge make available a copy of the transcript, or of a portion thereof, to defense counsel. Such order shall provide for prepayment of costs of such transcript by the defendant unless the defendant makes a sufficient affidavit that the defendant is unable to pay or to give security therefor, in which case the expense shall be paid by the Director of the Administrative Office of the United States Courts from available appropriated funds. Counsel for the government may move also that a copy of the transcript, in whole or in part, be made available to it, for good cause shown, and an order may be entered granting such motion in whole or in part, on appropriate terms, except that the government need not prepay costs nor furnish security therefor.</p>	
<p>(d) Production of Statements.</p> <p>(1) In General. Rule 26.2(a)-(d) and (f) applies at any hearing under this rule, unless the court, for good cause shown, rules otherwise in a particular case.</p> <p>(2) Sanctions for Failure to Produce Statement. If a party elects not to comply with an order under Rule 26.2(a) to deliver a statement to the moving party, the court may not consider the testimony of a witness whose statement is withheld.</p>	<p>(h) Production of Statements.</p> <p>(1) <i>In General.</i> Rule 26.2(a)-(d) and (f) applies at any hearing under this rule, unless the magistrate judge for good cause rules otherwise in a particular case.</p> <p>(2) <i>Sanctions for Failure to Produce Statement.</i> If a party disobeys a Rule 26.2(a) order to deliver a statement to the moving party, the magistrate judge must not consider the testimony of a witness whose statement is withheld.</p>

COMMITTEE NOTE

The language of Rule 5.1 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic, except as noted below.

First, the title of the rule has been changed. Although the underlying statute, 18 U.S.C. § 3060, uses the phrase *preliminary examination*, the Committee believes that the phrase *preliminary hearing* is more accurate. What happens at this proceeding is more than just an examination; it includes an evidentiary hearing, argument, and a judicial ruling. Further, the phrase *preliminary hearing* predominates in actual usage.

Rule 5.1(a) is composed of the first sentence of the second paragraph of current Rule 5(c). Rule 5.1(b) addresses the ability of a defendant to elect where a preliminary hearing will be held. That provision is taken from current Rule 40(a).

Rule 5.1(c) and (d) include material currently located in Rule 5(c): scheduling and extending the time limits for the hearing. The Committee is aware that in most districts, magistrate judges perform these functions. That point is also reflected in the definition of "court" in Rule 1(b), which in turn recognizes that magistrate judges may be authorized to act.

Rule 5.1(e), addressing the issue of probable cause, contains the language currently located in Rule 5.1(a), with the exception of the sentence, "The finding of probable cause may be based upon hearsay evidence in whole or in part." That language was included in the original promulgation of the rule in 1972. Similar language was added to Rule 41 in 1972 and to Rule 4 in 1974. In the original Committee Note, the Advisory Committee explained that the language was included to make it clear that a finding of probable cause may be based upon hearsay, noting that there had been some uncertainty in the federal system about the propriety of relying upon hearsay at the preliminary examination. *See* Advisory Committee Note to Rule 5.1 (citing cases and commentary). Federal law is now clear on that proposition. Thus, the Committee believed that the reference to hearsay was no longer necessary. Further, the Committee believed that the matter was best addressed in Rule 1101(d)(3), Federal Rules of Evidence. That rule explicitly states that the Federal Rules of Evidence do not apply to "preliminary examinations in criminal cases,...issuance of warrants for arrest, criminal summonses, and search warrants." The Advisory Committee Note accompanying that rule recognizes that: "The nature of the proceedings makes application of the formal rules of evidence inappropriate and impracticable." The Committee did not intend to make any substantive changes in practice by deleting the reference to hearsay evidence.

Rule 5.1(f), which deals with the discharge of a defendant, consists of former Rule 5.1(b).

Rule 5.1(g) is a revised version of the material in current Rule 5.1(c). Instead of including detailed information in the rule itself concerning records of preliminary hearings, the Committee opted simply to direct the reader to the applicable Judicial Conference regulations governing records. The Committee did not intend to make any substantive changes in the way in which those records are currently made available.

Finally, although the rule speaks in terms of initial appearances being conducted before a magistrate judge, Rule 1(c) makes clear that a district judge may perform any function in these rules that a magistrate judge may perform.

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 5.1 is one of those rules. In revising Rule 5.1, the Committee decided to also propose a significant substantive change that would permit a United States Magistrate Judge to grant a continuance for a preliminary hearing conducted under the rule where the defendant has not consented to such a continuance. That version is being published simultaneously in a separate pamphlet.